No. 48442-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LINDA K. HARPER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge
Cause No. 15-1-00836-0

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Harper received due process, including notice and an opportunity to be heard, prior to her termination from drug court.

2. Whether a reasonable observer could conclude that Harper received a fair hearing on her motion for reconsideration.

3. Whether the trial court erred when it imposed a $30 fee to cover the remainder of Harper's balance due in drug court.

4. Whether appellate costs should be imposed on Harper if the State substantially prevails on appeal.

B. STATEMENT OF THE CASE.

The state accepts Harper's substantive and procedural facts of the case.

C. ARGUMENT.

1. Harper received both notice and an opportunity to be heard before she was terminated from drug court for numerous violations. Therefore, her due process rights were not violated.

The Fourteenth Amendment to the United State Constitution and Article 1 § 3 of the Washington State Constitution set a minimum standard of due process for all defendants. The State Supreme Court has held that "notice and an opportunity to be heard...before a competent tribunal" are the essential elements of due process. In re Messmer, 52 Wn.2d 510, 326 P.2d 1004 (1958). An individual's right to due process extends to diversion programs

and alternative courts, including drug courts. State v. Cassill-Skilton, 122 Wn. App. 652, 656-59, 94 P.3d 407 (2004).

RCW 2.28.170, which authorized the creation of drug courts, did not contain provisions regarding the operation of such programs. Id. at 658. While no specific requirements for drug courts were given, the Court of Appeals has found that statutes governing deferred prosecution agreements at the district court level can be applied to drug courts by analogy. Id. These analogous statutes require that an offender receive "a hearing, after notice, to determine whether to terminate a participant from the program." Id. Additionally, the defendant must be able to present evidence at the hearing. Id. While RCW 2.28.170 was replaced by RCW 2.30.030 in 2015, the underlying due process requirements have not changed. Laws of 2015, Ch. 291, § 3.

An example of a case where the defendant did not receive due process during a drug court termination is Cassill-Skilton, 122 Wn. App. at 658. In that case, there was "no record to show the basis of termination, any opportunity for a hearing on the alleged violation, nor any finding to show what evidence the court relied on in finding an agreement violation." Id. Therefore, given the lack of

any due process, the appeals court reversed the defendant's drug court termination. Id. at 658-59.

Harper argues that she received no notice of her impending termination and lacked the opportunity to be heard before she was terminated. There is ample evidence from the record that Harper received both notice and the opportunity to be heard.

Harper signed her drug court contract on November 3, 2015. 11-3-15 RP 3. By the time of her next appearance on November 10, 2015, Harper had already missed a Saturday education class, a sober support group meeting, and Cognitive Self Change (CSC) orientation. 11-10-15 RP 7. Based on these violations, Harper was given 16 hours of community service. Id. at 7-9. Harper's next court appearance was on November 17, 2015. 11-17-15 RP 10. By that time, Harper had missed another Saturday education class, had two positive urinalysis tests, and had not completed any of her required community service hours. Id. at 11. These violations were read into the record by the court in the presence of Harper. Id. Following the recommendation of drug court staff, the Court imposed a sanction of seven day jail. Id. at 9, 13.

At that same hearing, the State noted that it would likely be filing a motion to terminate Harper from drug court. Id. at 12. This

comment should have put Harper on notice that she would likely be terminated from drug court for the violations under discussion. The State then filed the termination petition, which was served on Harper. CP 26.

Harper argues that because the State's termination petition did not list Harper's specific drug court violations, she did not receive notice. Appellate Brief 9. However, it is reasonable to conclude that the reason stated for the termination: "failure to follow all terms and conditions of drug court," CP 26, was in reference to the violations placed on the record by the court at the November 17 hearing. After all, the State had noted that it would likely be filing a motion to terminate and did do so before the December 8 hearing. 12-8-15 RP 3.

Additionally, at that December 8 hearing, neither Harper nor her attorney questioned why she was being terminated. Id. at 3-6. In fact, her attorney stated that he had spoken with Harper and "really sat down and went through her file and went through all her court notes and her history in the program" with her. Id. at 3.

Furthermore, Harper referenced several of her violations in her statement to the court. Id. at 4-5. She acknowledged that her dedication to the program "didn't show as far as being participating

in and being in classes and making it to the class on time due to other reasons as far as my health." Id. at 4. This statement is clearly referring to her failure to attend several mandatory meetings, violations read into the record on November 17. Harper then went onto discuss her "dirty UAs," saying that "as far as my sobriety goes that was the toughest." Id. at 5.The positive urinalysis tests were also among the violations noted by the court on November 17.

These statements by both Harper and her attorney make clear that, prior to the December 8 hearing, Harper knew why she was being terminated from the drug court program. This knowledge constitutes sufficient notice.

Harper also had an opportunity to be heard before her termination from drug court. While Harper did not make a statement on December 15, this appearance was only made for reading the record. 12-15-15 RP 7. The decision to terminate Harper had actually been made at the December 8 hearing, 12-8-15 RP 6, where Harper was given an opportunity to make a statement on the record. Id. at 4-5. Harper also gave a statement during the November 17 hearing, 11-17-15 RP 8, where she was advised that

she would likely be terminated from drug court. Therefore, Harper was afforded the opportunity to be heard prior to her termination.

Given that Harper received notice and had an opportunity to be heard prior to her termination from drug court, her due process rights were not violated.

2. A reasonable observer would conclude that Harper received a fair hearing on her motion for reconsideration.

In order to bring a claim under the Appearance of Fairness doctrine, a defendant must produce "proof of actual or potential bias." State v. Harris, 123 Wn. App. 906, 914, 99 P.3d 902 (2004) (footnotes omitted), *abrogated on other grounds by* State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005). A judge is presumed to have performed his or her duties without prejudice. Id. Therefore, mere speculation is not sufficient to find bias. Id.

A claim of bias must also be timely raised. Buckley v. Snapper Power Equip. Co., 61 Wn. App. 932, 939, 813 P.2d 125 (1991). A defendant who proceeds with a "hearing before a judge despite knowing a reason for potential disqualification of the judge waives the objection and cannot challenge the court's qualifications on appeal." Id.

Harper argues that the Court disclosed its bias when, at the December 15 hearing, the Court told Harper that it was "not interested" in hearing from her and tore up a letter she had written to it. Appellate Brief 11-12. However, this issue of bias was not raised either during that December 15 hearing or on December 29, when the motion for reconsideration was heard. 12-15-12 RP 7-10; 12-29-15 RP 11-22. Given that the question of potential bias was not raised until the appeal, the challenge was not timely and so the issue was waived.

Even if the issue of potential judicial biased had been timely raised, there is no evidence that it affected the outcome of Harper's motion for reconsideration. As noted by her counsel, the motion to reconsider the termination and instead enter Harper into a chemical dependency program was "highly unusual." 12-15-12 RP 8. Her attorney also stated that "I don't believe that it's been done in the past." Id. Given these statements by Harper's own attorney, it was unlikely that any court would change the decision to terminate Harper.

Examination of the court's own statements and actions made during the reconsideration hearing also do not support a claim of bias. When ruling on the motion for reconsideration, the Court

acknowledged that it had acted unprofessionally during the previous hearing and apologized to Harper. 12-29-15 RP 14-15. While the Court did not rescind Harper's termination, it did act with leniency during sentencing, agreeing with the recommendation that Harper be given the lowest sentence on the standard range. 12-29-15 RP 19, 21. Given the Court's apology and favorable sentence, no impartial observer could believe that the Court acted with bias during the reconsideration hearing.

Even if Harper did not waive her right to object, there is no evidence that the court potentially acted with bias during the motion to reconsider Harper's termination.

3. It was not error when the trial court imposed a $30 fee to cover the remainder of Harper's balance due to drug court.

The purpose of drug courts is to reduce recidivism by diverting offenders into treatment programs. Cassill-Skilton, 122 Wn.App. at 410-11 (Van Deren, J., concurring). While the legislature has given counties the option of establishing drug courts, there is no requirement that counties do so. State v. Harner, 153 Wn.2d 228, 238, 103 p.3d 738 (2004). Therefore, offenders who are prosecuted in counties where no drug courts exist "have not been denied any right to participate in drug court because no

constitutional due process right exists." Id. Nothing in RCW 2.30.030, which replaced the previous drug court authorization, changes this understanding. Laws of 2015, Ch. 291, § 3.

Because there is no right to drug court, counties have the ability to choose which offenders to admit into drug court. In Thurston County, offenders who are accepted into drug court sign a contract. CP 12-15. As one of the contract provisions, defendants agree to pay a set rate for treatment. Id. at 13. Harper's rate was set at $30 per week. Id. If the offender does not agree to any of the stipulations, he or she is not eligible for drug court and will be processed on the regular trial track.

Harper claims that the $30 fee she was required to pay after termination was not authorized by the legislature. Appellate Brief 13. Harper cites RCW 10.01.160, which limits what costs can be imposed on a defendant after she has been convicted, to support her claim. Id. at 14.

However, Harper's $30 fee was not imposed at sentencing. Instead, Harper had agreed to pay the $30 per week when she enrolled in drug court. When she was terminated from drug court, she had a remaining balance debt of $30. Therefore, the court was not imposing a new fee to cover costs not contemplated by RCW

10.01.160, but instead reminding Harper of her contractual obligation to pay what she had already agreed to.

Even if the imposition of the $30 fee is viewed as a new cost imposed at sentencing, this Court is not required to review fees that the defendant did not object to. State v. Gonzalez-Gonzalez, 193 Wn. App. 683, 370 P.3d 989 (2016). In Gonzales, the trial court imposed a $700 fee to pay for the court-appointed attorney. Id. at 992. When deciding whether to exercise its discretion and grant review, the court considered (1) the amount of the court imposed fee, (2) what the administrative burden and expense would be to bring the defendant to court for a resentencing, and (3) whether a resentencing hearing would likely change the financial obligation. Id. at 994-95. Because of "the small amount of discretionary LFO's imposed and the unlikelihood that a new sentencing hearing would change the LFO result," the Court declined to consider the alleged error. Id. at 995.

In this case, Harper is not entitled to review because she did not object to the imposition of the $30 fee at her sentencing hearing. 12-29-15 RP 11-22. Neither should this Court exercise its discretion to review the fee. First, this fee is $30, making it much less than the $700 fee imposed in Gonzales, where review was not

granted. As for the second factor, there would be a significant administrative burden and costs associated with bringing Harper back for resentencing. Harper is currently serving her sentence at the women's correctional center in Gig Harbor. CP 75. The costs of transporting Harper back to Thurston County and housing her would far exceed the $30 in dispute. Finally, it is unlikely that Harper's fee would change if she were resentenced. If Harper is successful in challenging her termination, she would be readmitted to drug court and would still be bound by all the provisions she initially agreed to, including the $30 weekly fee.

Harper's $30 fee does not violate RCW 10.01.160 because the fee was not a new cost imposed by the trial court. Instead, she had voluntarily agreed to pay the fee when she signed her drug court contract. Furthermore, even if the fee is inconstant with RCW 10.01.160, the court should not review Harper's claim because it was not raised at trial, the sum in dispute is inconsequential, and the fee is unlikely to change if Harper prevails on her other claims.

4. The issue of whether appellate costs should be imposed on Harper if the State substantially prevails on appeal is not ripe.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997), the Supreme Court held this statute constitutional, affirming the Court of Appeals' holding in State v. Blank, 80 Wn. App. 638, 641-642, 910 P.2d 545 (1996).

State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000), noted that in State v. Keeney, 112 Wn.2d 140, 769 P.2d 295 (1989), the Supreme Court found the imposition of statutory costs on appeal in favor of the State against a criminal defendant to be mandatory under RAP 14.2 and constitutional, but that "costs" did not include statutory attorney fees. Keeney, 112 Wn.2d at 142.

Nolan examined RCW 10.73.160 in detail. The Court pointed out that, under the language of the statute, the appellate court had discretion to award costs. 141 Wn.2d at 626, 628. The Court also rejected the concept or belief, espoused in State v. Edgley, 92 Wn.

App. 478, 966 P.2d 381 (1998), that the statute was enacted with the intent to discourage frivolous appeals. Nolan, 141 Wn.2d at 624-625, 628.

In Nolan, as in most of other cases discussing the award of appellate costs, the defendant began review of the issue by filing an objection to the State's cost bill. Id., at 622. As suggested by the Supreme Court in Blank, 131 Wn.2d at 244, this is an appropriate manner in which to raise the issue. The procedure created by Division I in State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), prematurely raises an issue that is not before the Court. The defendant can argue regarding the Court's exercise of discretion in an objection to the cost bill, if he does not prevail, and if the State files a cost bill.

Under RCW 10.73.160, the time to challenge the imposition of LFOs is when the State seeks to collect the costs. See Blank, 131 Wn.2d at 242; State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009) (citing State v. Baldwin, 63 Wn. App. 303, 310-311, 818 P.2d 1116 (1991)). The time to examine a defendant's ability to pay costs is when the government seeks to collect the obligation because the determination of whether the defendant either has or will have the ability to pay is clearly somewhat speculative. Baldwin,

63 Wn. App. at 311; see also State v. Crook, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). A defendant's indigent status at the time of sentencing does not bar an award of costs. Id. Likewise, the proper time for findings "is the point of collection and when sanctions are sought for nonpayment." Blank, 131 Wn.2d at 241–242. See also State v. Wright, 97 Wn. App. 382, 965 P.2d 411 (1999).

The defendant has the initial burden to show indigence. See State v. Lundy, 176 Wn. App. 96, 104 n.5, 308 P.3d 755 (2013). Defendants who claim indigence must do more than plead poverty in general terms in seeking remission or modification of LFOs. See State v. Woodward, 116 Wn. App. 697, 703-704, 67 P.3d 530 (2003). The appellate court may order even an indigent defendant to contribute to the cost of representation. See Blank at 236-237, quoting Fuller v. Oregon, 417 U.S. 40, 53-53, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974).

While a court may not incarcerate an offender who truly cannot pay LFOs, the defendant must make a good faith effort to satisfy those obligations by seeking employment, borrowing money, or raising money in any other lawful manner. Bearden v. Georgia, 461 U.S. 660, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1976); Woodward, 116 Wn. App. at 704.

The imposition of LFOs has been much discussed in the appellate courts lately. In State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). The Court wrote that:

> The legislature did not intend LFO orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case-by-case analysis and arrive at an LFO order appropriate to the individual defendant's circumstances.

Id. at 834. The Court expressed concern with the economic and financial burden of LFOs on criminal defendants. Id., at 835-837. The Court went on to suggest, but did not require, lower courts to consider the factors outlined in GR 34. Id., at 838-839.

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

The fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3

specifically includes "recoupment of fees for court-appointed counsel." Obviously, all these defendants have been found indigent by the court. Under the defendant's argument, the Court should excuse any indigent defendant from payment of costs. This would, in effect, nullify RCW 10.73.160(3).

As Blazina instructed, trial courts should carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, as Sinclair points out at 389, the Legislature did not include such a provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship." See RCW 10.73.160(4).

Certainly, in fairness, appellate courts should also take into account the defendant's financial circumstances before exercising its discretion. It is to be hoped, pursuant to Blazina, that trial courts will develop a record that the appellate courts may use in making their determination about appellate costs. Until such time as more and more trial courts make such a record, the appellate courts may base the decision upon the record generally developed in the trial court, or, if necessary, supplemental pleadings by the defendant.

In this case, the record is relatively limited as to Harper's ability to pay future costs. While Harper is indigent, there is little in the record to suggest that she will never be able to pay even a portion of her appellate costs. Harper points to Sinclair to argue that her current indigence is determinative as to future ability to pay. In Sinclair, the court found that the defendant had "no realistic possibility" of ever paying his appellate costs because he was a 66-year old sex offender sentenced to "a minimum term of more than 20 years." Sinclair, 192 Wn. App. at 393. In this case, Harper is only 32. Furthermore, she has only been sentenced to 43 months, with a mandatory drug treatment program to follow release.

While Harper may have challenges, there is little in the current record to suggest she could not contribute to her appellate costs in the future. Given that the State has yet to substantially prevail or request appellate costs, this Court should wait until the cost issue is ripe before further exploring the issue legally and substantively.

D. CONCLUSION.

For the reasons stated, the State respectfully asks that Harpers judgement and sentence be affirmed. Additionally, this Court should wait until the cost issue is ripe before determining whether Harper can contribute to her appellate costs.

Respectfully submitted this 27th day of July, 2016.

JON TUNHEIM
Prosecuting Attorney, Thurston County

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent on the date below as follows:

Electronically filed at Division II

TO: DAVID C. PONZOHA, CLERK
COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

AND VIA E-MAIL

JOHN A. HAYS
ATTORNEY AT LAW
1402 BROADWAY STREET
LONGVIEW, WA 98632-3714

JAHAYSLAW@COMCAST.NET

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of July, 2016, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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